

ESTTA Tracking number: **ESTTA930845**

Filing date: **10/24/2018**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91233690
Party	Defendant Rusty Ralph Lemorande
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Submission	Opposition/Response to Motion
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Date	10/24/2018
Attachments	NOLD Surrebuttal to Opposer Response to Applicant Motion to Com- pel.pdf(70536 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

IMAGE TEN, INC.

Opposer

v.

RUSTY LEMORANDE

Applicant

Opposition No. [91233690](#)

SURREBUTTAL TO OPPOSER'S
RESPONSE TO APPLICANT'S MOTION
TO SUSPEND PROCEEDINGS AND TO
COMPEL ACTION ON PART OF IMAGE
10, OPPOSER

Serial No: 87090468
Publication date: 11/29/2016
Opposition Number: 91233690
For the Mark: NIGHT OF THE LIVING DEAD

INTRODUCTION

The recent filing by Counsel for Opposer contains several misleading statements which may confuse or negatively prejudice the TTAB in its decision. Therefore, this surrebuttal is respectfully submitted.

It should be noted that Opposer, in its most recent filing, has not denied or rebutted any of the assertions made by Applicant.

Therefore, it seems proper that all events stated and documented (such as phone calls attempted, conversations cut short, emails not responded to, etc.) should be now taken as factual.

OBJECTIONS TO OPPOSER'S RECENT STATEMENTS TO THE TTAB

As Applicant properly described in his most recent Motion to Compel, including supporting evidence, Counsel for Opposer (hereinafter 'Counsel') caused Applicant to toll all of its actions in this Opposition based on:a) the promise of Counsel for Opposer submitting its withdrawal to the TTAB within one business day of the conference call initiated by Applicant on, andb) agreeing to stipulate to an extension of time.

1 Now Counsel for Opposer, in its most recent submission to the
2 TTAB, states that applicant didn't allow enough time for Counsel
to submit its withdrawal.

3 As the record shows, for a period of nearly three weeks, while
4 knowing Applicant's discovery clock was running, Opposer failed
5 to take action or even respond to a clearly worried Applicant's
6 many inquiries. Whether this was intended by Opposer to, once
7 again, box Applicant from his fair right to discovery, or simply
8 the result of ignoring the matter given Counsel was no longer
9 being paid, or another possible reason, is irrelevant to the
fact that these delays were harming Applicant who was forced to
make multiple written and telephonic efforts to get resolution,
and now causes both Applicant and TTAB unnecessary expenditures
of time and motion practice.

10 Counsel for Opposition, in its most recent filing, mentions some
11 brief arguments supporting its non-production of requested
12 documents. This is not only wrong procedure but an utterly
unfair one.

13 Here's why:

14 As the TTAB ordered, prior to filing another motion on discovery
matters, the parties were advised to first:

15 1) pick up the phone and meet and confer. If that
16 phone conference did not resolve the issues, the parties
17 were advised to,

18 2) schedule and engage in a three-way conference call with
the TTAB.

19 Applicant, after several attempts (as detailed in Applicant's
20 most recent motion to which this document is a supplement),
21 finally, after several attempts, was able to set a time with
Counsel for Opposer to speak telephonically. When that call
22 finally occurred, Counsel for Opposer immediately told Applicant
there was nothing to discuss given Counsel's imminent
withdrawal.

23
24 Therefore, steps one and two above did not occur solely as a
25 result of Image 10's Counsel election (these steps having been
required by the TTAB before filing any further motions, etc.,
regarding problems with discovery.)

26 However, in its most recent filing, Opposer has submitted
27 arguments to the TTAB *vis a vis* Opposer's opposition to
28 Applicant's document requests!

1 This not only violates the prior order of the TTAB but fails to
2 follow basic TTAB procedure. Specifically, failing resolution
3 between parties in a document request, it is the proponent's
4 right to file a motion to compel to which the opponent/recipient
of the document request may or may not chose to respond and
rebut.

5 However, now Opposer attempts to reverse this procedure,
6 possibly due to simple error or in an attempt to play a wrongful
7 procedural maneuver with both Applicant and the TTAB.

8 For the record, Applicant has diligently and previously
9 researched Opposer's limited reasoning for failing to produce
documents. Applicant has communicated those views to Opposer in
multiple emails (emails to which Opposer has never corresponded
10 with alternate viewpoints, nor, as described above, even
attempted to discuss the matter with Applicant over the phone.)

11 **CONCLUSION**

12 Applicant hopes that this surrebuttal clarifies and refutes
13 Opposer's most recent reply to the TTAB.

14 Applicant accepts that Opposer should be given time to find new
15 counsel, or declare itself as counsel in pro per. Once Opposer
makes that determination (subject, of course, to permission and
16 a timeline from the TTAB) then Applicant will reengage new
counsel with the proper discussions, including telephonic as
17 required by the TTAB, regarding the outstanding document
requests, and proceed properly, fairly and customarily from that
18 point.

19 In summary:

- 20 1) Opposer's statement that it did not have time to withdrawal is
21 untrue and dissembling. It seems obvious that failing
Applicant's motion in this matter, Opposer still may not have
22 taken action to file a simple three sentence withdrawal
request with the TTAB, or sign a stipulation agreed to and
23 then drafted by Applicant, possibly intended to play out
Applicant's discovery time frame even further that it had
24 already.
- 25 2) Opposer's arguments as to why documents need not be provided
26 is improper in that: a) it was not proceeded by a phone
conference between the parties, or, b) the group conference
27 call with the TTAB, both as required by the TTAB's order
and, c) Opposer's untimely arguments against document
28

1 production should only properly follow a Motion to Compel by
2 Applicant which could only be submitted following completion
of item 2(a) and, if necessary, 2(b) as required by the TTAB.

3 3) In other words, Opposer's attempt at a procedural end-run
4 should not be allowed.

5 Respectfully submitted this 24th day of October 2018.
6
7

8 /Rusty
9 Lemorande/

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CERTIFICATION OF GOOD FAITH EFFORT TO RESOLVE DISPUTE

In accordance with Trademark Rule 2.120(e), Petitioner hereby certifies that he has made a good faith effort to resolve the issues presented above.

/Rusty
Lemorande/

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Surrebuttal was served on Opposer's counsel of record in the above-captioned proceedings on October 24, 2018, via email correspondence addressed to: mmeeks@buchalter.com, and fbhatti@buchalter.com

/Rusty Lemorande/

Rusty Lemorande